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266 NLRB No. 155

D--9877
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUMMA CORPORATION d/b/a
FRONTIER HOTEL

and

Case 31--CA--12665

GENERAL SALES DRIVERS,
DELIVERY DRIVERS AND
HELPERS, LOCAL 14,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

DECISION AND ORDER

Upon a charge filed on 2 December 1982 by General Sales Drivers, Delivery Drivers and Helpers, Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Summa Corporation d/b/a/ Frontier Hotel, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint and notice of hearing on 21 December 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and

notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 9 November 1982 following a Board election in Case 31--RC--3680 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about 23 November 1982 and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 31 January 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached.² Subsequently, on 9 February 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary

¹ Official notice is taken of the record in the representation proceeding, Case 36--RC--3680, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² On 23 February 1983 the General Counsel and Respondent filed a Joint Motion to Supplement Record, attaching various documents. The joint motion is hereby granted.

Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits the request and refusal to bargain, but attacks the Union's certification on due process grounds, based on its contentions previously made in the underlying representation proceeding. Specifically, Respondent contends that it was improperly denied a hearing with respect to certain of its objections to conduct affecting the results of the second election in Case 31--RC--3680, and by the Board's refusal to order the Regional Director for Region 31 to transfer to the Board the Region's investigatory file concerning Respondent's objections, prior to certifying the Union in Summa Corporation d/b/a Frontier Hotel, 265 NLRB No. 46 (1982).

Review of the record herein, including the record in Case 31--RC--3680, reveals that pursuant to the Board's 31 December 1980 "Order Vacating Decision and Order, Rescinding Certification and Remanding Proceedings to the Regional Director For Second Election and Direction of Second Election, and a Stipulation for Certification Upon Consent Election," a second

election was held 7 February 1981 resulting in a vote for 160 for, and 63 against, the Union.³ Thereafter, Respondent filed timely objections to conduct affecting the results of the election alleging, in substance, that (1) during the election campaign, the Union made misrepresentations of fact concerning job security and strike procedures in the event of a union victory in the election; (2) union agents and organizers of the Union represented to employees that, if the Union did not win the election, there would be mass discharges for retaliatory reasons, and made other coercive statements to employees; and (3) a local newspaper published articles attempting unfairly to influence the outcome of the election by mischaracterizing the results of the first election and by reporting results of a statistically improbable poll of employees prior to the second election.

After investigation, the Regional Director issued his Report on Objections in which he recommended that Respondent's

³ The first election, which the Union won, was conducted on 21 January 1977 pursuant to the Stipulation for Certification Upon Consent Election. Subsequently, on 25 August 1978 the Board certified the Union as the exclusive bargaining representative of the employees in the unit stipulated to be appropriate. Thereafter, in Summa Corporation d/b/a Frontier Hotel, 242 NLRB 590, the Board issued a Decision and Order, in which it granted the General Counsel's earlier Motion for Summary Judgment, finding that Respondent had violated Sec. 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. Respondent petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's bargaining order, and the Board cross-petitioned for enforcement. In Summa Corporation d/b/a Frontier Hotel v. N.L.R.B., 625 F.2d 293, the court denied enforcement of the Board's Order. Accordingly, on 31 December 1980 the Board issued its "Order Vacating Decision and Order, Rescinding Certification and Remanding Proceedings to the Regional Director For Second Election and Direction of Second Election."

Objections be overruled in their entirety. Thereafter, Respondent filed timely exceptions to the Regional Director's report, contending, inter alia, that it was improperly denied a hearing on its objections. At the same time, Respondent filed a "'Motion For Order Directing Regional Director To Transmit Record,'" requesting that the Board require that the Regional Director transmit the investigatory case file on the objections to the Board. On 9 November 1982 the Board, in Summa Corporation d/b/a Frontier Hotel, 265 NLRB No. 46, having considered the Regional Director's report, Respondent's exceptions thereto, and the entire record, adopted the findings and recommendations of the Regional Director, and certified the Union as the exclusive bargaining representative of the employees in the unit stipulated to be appropriate. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the prior representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁴

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege

⁴ See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding, Respondent contends that due process entitled it to a hearing on its objections to the election. Prior to adopting the findings, conclusions, and recommendations of the Regional Director's Report on Objections, the Board considered the report, Respondent's exceptions thereto, and the entire record in this case, including witness statements submitted to the Regional Director by Respondent and relied on by the Regional Director.⁵ In adopting the report and recommending that Respondent's objections be overruled, the Board specifically found that the objections raised no substantial or material issue warranting a hearing.⁶ Further, it is well established that parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a prima facie showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional

⁵ Summa Corporation d/b/a Frontier Hotel, 265 NLRB No. 46, sl. op. at 6, fn. 5.

⁶ In so doing, the Board carefully considered and rejected Respondent's contention that the Board should order the Regional Director to transmit the investigatory file on the objections to the Board, as well as Respondent's contention that it was entitled to a hearing on its objections.

requirements of due process.⁷ Accordingly, we conclude that Respondent by refusing, upon request, to bargain collectively with the Union has violated Section 8(a)(5) and (1) of the Act, and we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a Delaware corporation with an office and principal place of business located in Las Vegas, Nevada, where it is engaged in the operation of a hotel and casino. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of \$500,000, and annually purchases and receives goods or services valued in excess of \$50,000, directly from suppliers located outside the State of Nevada.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

General Sales Drivers, Delivery Drivers and Helpers, Local 14, International Brotherhood of Teamsters, Chauffeurs,

⁷ GTE Lenkurt, Incorporated, 218 NLRB 660 (1975); Heavenly Valley Ski Area, 215 NLRB 734 (1974); Amalgamated Clothing Workers of America (Winfield Manufacturing Company, Inc.) v. N.L.R.B., 424 F.2d 818, 828 (D.C. Cir. 1970).

Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All gaming and casino dealers, shills, Keno writers and Keno runners employed by the Employer at its facility located at 3120 Las Vegas Boulevard South; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers, change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On 7 February 1981 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 9 November 1982 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 18 November 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 23 November 1982 and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about 23 November 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5)

and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Summa Corporation d/b/a Frontier Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. General Sales Drivers, Delivery Drivers and Helpers, Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All gaming and casino dealers, shills, Keno writers and Keno runners employed by the Employer at its facility located at 3120 Las Vegas Boulevard South; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers, change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 9 November 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 23 November 1982 and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has

engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Summa Corporation d/b/a Frontier Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Sales Drivers, Delivery Drivers and Helpers, Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All gaming casino dealers, shills, Keno writers, and Keno runners employed by the Employer at its facility located at 3120 Las Vegas Boulevard South; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers, change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Las Vegas, Nevada, facility copies of the attached notice marked "'Appendix.'"⁸ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

⁸ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

23 May 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Sales Drivers, Delivery Drivers and Helpers, Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousmen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All gaming casino dealers, shills, Keno writers and Keno runners employed by the Employer at its facility located at 3120 Las Vegas Boulevard South; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers, change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards and supervisors as defined in the Act.

SUMMA CORPORATION
d/b/a FRONTIER HOTEL

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213--824--7357.